Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT BOGETTI & SONS,
ROBERT BOGETTI & SONS II,
ROBERT PETER BOGETTI,
AND DEOLINDA MARIE BOGETTI,

Petitioners,

v.

BANK OF AMERICA, N.T. & S.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE NINTH CIRCUIT COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER WHEN IT AFFIRMED SUMMARY JUDGMENT AGAINST THE PETITIONERS WHO HAD SUBMITTED A SWORN DECLARATION AND THE ADMISSIONS OF THE RESPONDENT ON THE ISSUE OF THE PRECLUSIVE EFFECT OF A PRIOR STATE COURT DETERMINATION THAT THE DEBT OWING TO RESPONDENT WAS ONE DEBT, PARTLY SECURED, RATHER THAN TWO DEBTS, ONE SECURED AND THE OTHER NOT?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioners Robert Bogetti & Sons, Robert Bogetti & Sons II, Robert Peter Bogetti, and Deolinda Marie Bogetti state that they have no parent corporation nor non-wholly owned subsidiaries.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals denied petitioners' request for rehearing in an unpublished opinion. (Appendix, p. 34).

The Ninth Circuit, in an unpublished opinion, affirmed the Bankruptcy Appellate Panel's denial of rehearing and the BAP's opinion. (Appendix, p. 1).

The BAP denied petitioners' request for rehearing (Appendix, p. 5), and modified and affirmed the decision by the Bankruptcy Court. (Appendix, p. 7).

The Bankruptcy Court for the Eastern District of California granted the respondent's motions for summary judgment against petitioner (EOR 34, pp. 938-944 (tentative decision, first motion); EOR 20, p. 690 (order, first motion); EOR 28, p. 894 (order, second motion – on cross-claims)), and entered judgment against petitioners. (EOR 29, p. 896)

The California Superior Court, County of San Joaquin, order quashing writ of attachment (EOR 17, p. 683 (order); p. 671 (minute order)) after minute orders continuing hearing to obtain transcripts of Bankruptcy Court proceedings. (EOR 17, pp. 629, 630).

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

28 U.S.C. § 2101(c) (1999), states that "[a]ny other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or

applied for within ninety days after the entry of such judgment or decree." The Ninth Circuit filed its opinion granting respondent's motion for summary judgment against petitioners on April 29, 1999, Case No. 98-15319. Petitioners timely sought rehearing before the Ninth Circuit. On June 2, 1999 petitioners' petition for rehearing was denied, Case No. 98-15319.

"[I]f a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing. . . . " Sup. Ct. R. 13.3. Thus petitioners' have submitted this petition for writ within the ninety day limit set forth by 28 U.S.C. § 2101.

28 U.S.C. § 1254(1) (1999), states that "Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition or judgment or decree. . . . " Petitioners respectfully request that the Supreme Court grant writ of certiorari in the present civil appeal from the Ninth Circuit Court of Appeals.

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Fed. R. Civ. P. 56(c): *Motion and Pleadings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment

sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(e): *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE AND ORIGINAL BASIS FOR FEDERAL JURISDICTION

Petitioners petition for certiorari to the Supreme Court after the judgment and decision of the Ninth Circuit Court of Appeals (Appendix, p. 1), and denial of petitioners' motion for rehearing (Appendix, p. 34), affirming respondent's motions for summary judgment against petitioner and in favor of respondent originally entered by the Bankruptcy Court for the Eastern District of California (EOR 20, p. 690; EOR 28, p. 894), and subsequently affirmed by the Bankruptcy Appellate Panel (Appendix, p. 7) as amended. (Appendix, p. 5)

The United States District Court is vested with original and nonexclusive jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." (28 U.S.C. § 1334(b) (1999).) Proceedings "arising under title 11 or arising in or related to a case under title 11 [are] referred to the bankruptcy judges for the district." (28 U.S.C. § 157(a) (1999).)

This case arose from the respondent's effort to obtain summary judgment in an adversary proceeding seeking a declaratory ruling from the Bankruptcy Court on the issue of whether the petitioners owed to the respondent one debt partly-secured by real property, or two debts, one unsecured and the other secured (EOR 10, p. 177 (motion); EOR 11, p. 181 (supporting declaration); EOR 12, p. 200 (points and authorities); EOR 13, p. 210 (statement of purportedly undisputed facts); EOR 14, p. 213 (request for judicial notice)), *after the California Superior Court in San Joaquin County issued an appealable decision in petitioners' favor on that issue which was not appealed by*

respondent. (EOR 17, p. 683 (order); p. 671 (minute order); EOR 8, pp. 170-175 (declaration); EOR 16, pp. 255-257 (request for judicial notice); EOR 6, p. 94, EOR 12, p. 204, EOR 23, p. 700; EOR 27, pp. 874, 875 (admissions)).[1]

The Bankruptcy Court's order granting the respondent's first motion for summary judgment on the complaint was filed and entered on January 29, 1997. (EOR 20, p. 690) Petitioners filed a notice of appeal to the Bankruptcy Appellate Panel of the Ninth Circuit on February 7, 1997, within the ten-day limit in Bankruptcy Rule 8002. (EOR 21, p. 692) The Bankruptcy Court's order granting respondent's second motion for summary judgment on the petitioner's cross claim was filed and entered on March 26, 1997 (EOR 28, p. 894), and the judgment after both orders was also entered on that date. (EOR 29, p. 896) Petitioners then filed another notice of appeal to the Bankruptcy Appellate Panel on April 2, 1997, again within the ten-day limit in Bankruptcy Rule 8002. (EOR 30, p. 899)

After the Bankruptcy Appellate Panel upheld respondent's motions for summary judgment (EOR 37, p. 994), petitioners moved for rehearing (EOR 38, P. 1021), which motion was denied. (EOR 39, at p. 1068). Petitioners

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[1] Under California law, an order denying a motion to quash a writ of attachment is an appealable order. (California Code of Civil Procedure § 904.1(a)(5) (West 1999)). The respondent did not appeal from that order (EOR 8, p. 175), instead it dismissed the case without prejudice (EOR 7, p. 149), then brought the current action in the Bankruptcy Court for the Eastern District of California, seeking a redetermination of the *same issue* previously decided by the state court and not appealed by the respondent.

appealed to the Ninth Circuit Court of Appeals, pursuant to 28 U.S.C. § 158(d) (1999). (EOR 40, p. 1069). On April 29, 1999 the Ninth Circuit Court of Appeals issued a judgment and unreported opinion affirming summary judgment. (Appendix, p. 1). Petitioners' motion for rehearing by the Ninth Circuit was denied on June 2, 1999. (Appendix, p. 34).

ARGUMENT

I. THE PETITIONERS MET THEIR BURDEN OF COMING FORTH WITH EVIDENCE SUFFICIENT TO OVERCOME SUMMARY JUDGMENT WHEN THEY SUBMITTED THE SWORN DECLARATION OF THEIR COUNSEL AND THE ADMISSIONS OF THE RESPONDENT THAT SHOWED THAT THE STATE COURT HAD DETERMINED THAT THE DEBT WAS ONE DEBT, PARTLY SECURED. THE NINTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN ON NON-MOVANT PETITIONERS *TO PROVE* THAT FACT (AS IF AT TRIAL) AND ITS DECISION CONFLICTS WITH EVERY RECENT SUPREME COURT DECISION, AND WITH THE DECISIONS OF EVERY OTHER CIRCUIT, AND EVEN WITH ITS OWN DECISIONS, ON THE "BURDEN" IMPOSED ON THE NON-MOVING PARTY BY RULE 56.

Upon motion for summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" in the matter at bar, "[t]he judgment sought shall be rendered forthwith." (Fed. R. Civ. P. 56(c).) To overcome a

summary judgment motion, the adverse party "may not rest upon the mere allegations or denials" of his pleading, "but the adverse party's response, *by affidavits or as otherwise provided* . . . must set forth *specific facts* showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment . . . shall be entered against the adverse party." Fed. R. Civ. P. 56(e); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968).

The "burden" that the party opposing summary judgment bears has been the subject of several modern opinions of the Court:

In *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-6 (1986), Justice Powell, writing for the majority, explored what a "genuine" issue of fact is under Rule 56, and the non-movant's burden is to defeat a well supported motion:

> "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial. . . . ' Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'
>
> It follows from these settled principles that if the factual context renders respondents' claim implausible – if the claim is one that simply makes no . . . sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."

(*Id.* at 586-7.) Justice Powell also reaffirmed the principle set forth in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970), "that on [s]ummary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." (*Id.* at 587, citing *United States v. Diebold Inc.*, 369 U.S. 654, 655 (1962).)

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), Justice White, writing for the majority, explained that the opposing party's burden is to produce "material" facts in opposition, those that would make a difference to the outcome of a case:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . "

(*Id.* at 248.) And, Justice White again affirmed the familiar principle regarding the opponent's burden as expressed in *Adickes* and *Matsushita*:

> "More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the non moving party. . . . We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment, ' "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial. . . . " ' We observed further that . . . *'the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is*

> *not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.'* "

Elaborating on the burden of the non-movant on summary judgment, Justice White stated:

> "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. . . . [T]here is no issue for trial unless there is *sufficient evidence* favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.
>
> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the

> party producing it, upon whom the onus of proof is imposed.' "

(*Id.* at 249-252, citing *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872).)

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), then Justice Rehnquist recapped the rules regarding the moving party's "initial burden," the non-moving party's "burden" in opposition, as follows:

> "Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. . . .
>
> *Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of the motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on*

> *file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.* But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. . . .
>
> Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial. . . . ' "

(*Id.* at 322-4; emphasis added.) On the burden faced by the non-movant, then Justice Rehnquist wrote:

> *"We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. . . .* Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and *it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred."*

(*Id.* at 324; emphasis added.)

The Ninth Circuit in this case, *without any showing by the moving party of the absence of the material fact,* has held that "[b]ecause Debtors had the obligation to place evidence on the record demonstrating the state court *necessarily* interpreted the Plan and failed to do so, summary judgment in favor of Creditor was appropriate." (Appendix, p. 3; emphasis added.)

The respondent's motion *totally failed to show or even to assert* that the California Superior Court made its decision on any basis other than that the debt was "one debt, partly secured."[2] At the same time, petitioners positively met the requirement necessary to show the material fact *in detail sufficient* under *Matsushita*. In relevant part, counsel for petitioners' declaration states:

> "5. On February 7, 1996, debtors filed their motion in the STATE COURT ACTION to set aside the right to attach order, quash the writ of attachment, and release the property levied upon, on the grounds that under California law the BANK had only 'one for [sic, form] of action' (foreclosure) for recovery of any debt or enforcement of any right secured (even partly) by a mortgage or deed of trust on real property and that under California Code of Civil Procedure § 483.010(b) a writ of attachment could not issue on such a partly secured debt unless there was first a showing that there had been a decrease in the value of the security (and there was no such showing). . . .
>
> 6. A time-shortened hearing upon the debtors' motion was held in the STATE COURT ACTION on February 13, 1996. At that hearing counsel for the BANK (Mr. Parish) appeared and conceded that if the BANK's debt was ONE debt, partly secured by mortgage or deed of trust, then the debtors' motion to quash the writ of attachment was well-taken, but contended that

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[2] The respondent's position has been that the state court erred, not that it did not determine there was one debt partly secured, rather than two debts. (See the "admissions" quoted *infra*.)

> the bankruptcy counsel for the debtors had stipulated in bankruptcy court that there were TWO debts, one secured and one unsecured, and requested time to obtain the relevant transcripts of the bankruptcy proceedings. . . .
>
> 9. On March 29, 1996, the debtors appeared in state court and filed excerpts of the bankruptcy transcripts which they considered relevant, and argued to the state court that their debt to the BANK was ONE debt partly secured, and therefore the right to attach order should be set aside, the writ quashed, and the property levied upon released. . . .
>
> 11. On April 3, 1996, my office received the faxed letter from counsel for the BANK enclosing the portion of the bankruptcy transcripts which he contended showed the agreement by the debtors; former bankruptcy counsel that the debt owed to the BANK was TWO debts, rather than ONE debt partly secured by real property, and requesting an agreement to the 'reinstatement of the Writ of Attachment', and indicating that in the absence of such agreement he (Mr. Parish) would 'move for the reconsideration of the order setting aside the attachment, or alternatively, seek the issuance of a new attachment'. . . . "

(EOR 8, pp. 170-175.) The respondent never submitted a counter-declaration that disputed the sworn declaration of petitioners' counsel of what the state court had done. Nowhere in the record before the lower courts did the respondent ever dispute that the ground on which the

state court quashed the writ. In fact, the positive statements of respondent's counsel to the lower courts *admitted* that the California Superior Court granted petitioners' motion to quash on precisely that ground:[3]

> "On March 29, 1996 the [petitioners] *appeared . . . before the state court and argued that the Plan created a single, partially secured debt, and thus that a writ of attachment was improper. The state court granted the* [petitioners'] *motion to quash the writ of attachment on March 29, 1996.*"

(EOR 6, p. 94; emphasis added.) On another occasion, respondent *admitted*:

> "[the state court] granted an order attaching certain of defendants' property under the unsecured claim. *The defendants later argued in a motion to quash the writ of attachment that the Plan created one claim.* The State court continued the hearing on the motion in order to allow the parties to submit transcripts of the hearings in this court to determine the meaning of the Plan. At a hearing on March 29, 1996, defendants submitted portions of transcripts to the Court. With that limited record, the State Court quashed the writ of attachment. . . . "

(EOR 12, p. 204; emphasis added). Yet again, respondent admitted:

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[3] These positive assertions of fact by respondent's counsel to the bankruptcy court may indeed be (and petitioners would argue that they are) "judicial admissions" that, if anything, would conclusively "establish" this fact in the petitioners' favor. (*Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880); *U.S. v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991), cert. den., 504 U.S. 958 (1992).)

> "On January 31, 1996, the Bank filed a complaint against Debtors, Case No. 291748, in the San Joaquin Superior Court . . . seeking damages for breach of the plan, and obtained, ex parte, a writ of attachment which was levied against Debtors' assets. *Debtors successfully set aside the writ of attachment, arguing incorrectly, that under the Plan the Bank held a single claim partially secured by real property and that the attachment was therefore improper.*"

(EOR 23, p. 700; emphasis added).

Here, petitioners did not simply rely on their pleadings in opposition to respondent's motions. Petitioners requested the bankruptcy court to take judicial notice (EOR 17, at p. 288) of the prior sworn declaration of their counsel (EOR 8, at p. 170-175) relating the procedural history and the issue before the California Superior Court (EOR 8, pp. 171-172), as well as the state court's resolution of that issue (EOR 8, p. 173). Here the respondent did not make an initial showing of the absence of this fact. Instead, the respondent's admissions *corroborated* that declaration. There was no contrary evidence presented by the respondent to the bankruptcy court. Again, viewing the submitted evidence in the light most favorable to the non-movant under *Adickes* and *Matsushita*, the respondent's motion for summary judgment should have been denied.

Furthermore, this case is not a matter of hoping "that something can be developed at trial in the way of evidence to support . . . allegations." (*First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968).)

Rather, the transcript of the state court's ruling on the motion to quash the writ of attachment (see EOR 36, pp. 983-992), judicial notice of which has been steadfastly refused by the appellate courts in this case (see Ninth Circuit BAP decision, Appendix at p. 19-22; Ninth Circuit, Appendix at p. 4), clearly shows that the state court based its ruling on the fact that the petitioners' debt to respondent was "one debt, partly secured" and not "two debts."

This Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) succinctly noted that the initial burden rests *on the movant* "of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party."[4]

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[4] This is the unanimous rule among the circuits. Interestingly, the Ninth Circuit ignored its own precedent in *Watts v. United States*, 703 F.2d 346, 347 (9th Cir. 1983), where the court noted that summary judgment is not a method by which a party can shift to an adversary the burden of proof on one or more issues; see also, *Rodway v. U.S. Department of Justice*, 482 F.2d 722 (D.C. Cir. 1973); *Mack v. Cape Elizabeth School Bd.*, 553 F.2d 720 (1st Cir. 1977), the movant assumes the burden of affirmatively showing that there is no genuine issue of fact on every relevant issue raised by the pleadings; *Hayden Pub. Co. v. Cox Broadcasting Corp.*, 730 F.2d 64 (2d Cir. 1984), the burden of showing that there was no factual dispute about the effect of defendants' alleged practices was on defendants, not plaintiff; *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974); *Catawba Indian Tribe of South Carolina v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992), cert. den., 507 U.S. 972 (1993); *Kellerman v. Askew*, 541 F.2d 1089 (5th Cir. 1976); *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976); *Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir. 1973); *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976); *SMS Manufacturing Co. v. U.S.-Mengel Plywoods, Inc.*, 219 F.2d 606 (10th Cir. 1955); *United States v. One (1) 1944*

It is manifest that under *Adickes*, the respondent here utterly failed to meet its initial burden to show that there are no genuine issues of material fact. And, *the respondent did not produce a shred of evidence to counter the validity of the declarations of petitioners' counsel.* In fact, respondent's admissions *corroborated* counsel for petitioner's sworn declarations. If, as this Court pronounced in *Adickes*, one must view the evidence in the light most favorable to the non-moving party, *the only possible conclusion* here is that there is a triable issue whether the California Superior Court had made the determination that petitioner owed "one debt" and not "two debts."

CONCLUSION

The Ninth Circuit has effectively permitted the respondent to "forum shop," to evade the normal channels of appeal in the state courts, to ignore the doctrine *res judicata* (issue preclusion)[5] by ignoring the first determination by the state court, and to ignore the "full, faith and credit" statute.[6] To do so it has totally disregarded the rules regarding the burden borne by the party opposing the motion and refused to take judicial notice of the transcript of the state court proceedings that would conclusively "prove" (at trial) the fact as stated in the sworn

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Steel Hull Freighter Converted Wartime Landing Craft Utility Vessel (LCU) Shamrock, 697 F.2d 1030, 1032 (11th Cir. 1983).

[5] *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981); *Peck v. Hagen*, 215 Cal.App.3d 602, 607-610 (1989).

[6] 28 U.S.C. § 1738; *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524-25 (1986).

declaration of the petitioners' counsel and as shown by the transcript it refused to judicially notice.

This shifting of the burden on summary judgment, in the words of Rule 10 of the Court's rules, has "so far departed from the accepted and usual course of judicial proceedings" that it should not be sanctioned. Accordingly, the petitioners respectfully submit that they have properly avoided summary judgment, and respectfully request that this Court either summarily overturn the Ninth Circuit's decision without comment under Rule 16(1) of the Supreme Court Rules, or grant this petition for writ of *certiorari* to further explicate the burden a non-moving party must carry to avoid summary judgment under Rule 56.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ROBERT BOGETTI & SONS, Debtor.	No. 98-15319 BAP No. EC-97-01083-RyMeRu
ROBERT BOGETTI & SONS; ROBERT BOGETTI & SONS, II; ROBERT PETER BOGETTI; DEOLINDA MARIE BOGETTI, Appellants, v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, Appellee.	MEMORANDUM[1] (Filed June 2, 1999)

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Ryan, Meyers, and Russell, Judges, Presiding

Argued and Submitted April 15, 1999
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Before: GOODWIN and TROTT, Circuit Judges, and KING, District Judge.[2]

Debtors appeal the Bankruptcy Appellate Panel's ("BAP") order affirming two summary judgments entered by the bankruptcy court in favor of Creditor. The bankruptcy court granted summary judgments to Creditor on its declaratory judgment action seeking interpretation of Debtors' plan for reorganization (the "Plan") and on Debtors' counter-claims, and the BAP affirmed. We have jurisdiction under 28 U.S.C. §§ 158(d) & 1291 (1994), and we affirm.

The complex facts and procedural history of this case are well known to the parties and are not repeated here. We review decisions of a bankruptcy court, on appeal from review by the BAP, independently, without deference to the BAP. *United States v. Battley* (*In re Kimura*), 969 F.2d 806, 810 (9th Cir. 1992). Issues of law are reviewed de novo, and issues of fact are reviewed for clear error. *Id.*

Debtors contend the bankruptcy court did not have jurisdiction to interpret the Plan. We disagree. A bankruptcy court retains jurisdiction over declaratory judgment actions requesting the bankruptcy court to construe its own order. *Beneficial Trust Deeds v. Franklin* (*In re Franklin*), 802 F.2d 324, 326 (9th Cir. 1986).

Debtors contend the bankruptcy court erred in failing to accord issue preclusive effect to an interpretation of the Plan by a California state court. We look to California law to determine whether issue preclusion applies. *First*

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[2] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

Nat'l Bank v. Russell (*In re Russell*), 76 F.3d 242, 244 (9th Cir. 1996). Debtors were required to prove five elements to avail themselves of issue preclusion, including proving the issue was "necessarily decided in the [state court] proceeding." *Lucido v. Superior Ct.*, 795 P.2d 1223, 1225 (Cal. 1990). Because Debtors had the obligation to place evidence on the record demonstrating the state court necessarily interpreted the Plan and failed to do so, summary judgment in favor of Creditor was appropriate. *See United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979) ("It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.").

Debtors argue that the issue of whether the state court necessarily interpreted the Plan never arose until summary judgment at the bankruptcy court, so they did not have notice of the need to place evidence on this element of collateral estoppel on the record. However, the bankruptcy court presented the parties with a tentative summary judgment ruling in Creditor's favor. Debtors did not move for an extension of time to supplement the record before summary judgment. Debtors also failed to move for reconsideration of the summary judgment by the bankruptcy court. These mechanisms are in place specifically to protect parties from Debtors' plight, and Debtors' failure to use them prevents our reversing the bankruptcy court in this case.

Debtors finally request we take judicial notice of a transcript of an argument before the state court, which Debtors maintain conclusively answers the question of whether the state court necessarily interpreted the plan.

We have discretion to take judicial notice of facts not in the record. *See* Fed. R. Civ. P. 201(f) ("Judicial notice may be taken at any stage of the proceeding.") However, this discretion is rarely exercised, *Lasky*, 600 F.2d at 769, and we decline to do so in this case. Debtors had ample opportunity to put the transcript on the record before the bankruptcy court.

Debtors California-law counterclaims of abuse of process and malicious prosecution require proof of, respectively, wrongful use of process and bringing the action without probable cause. *Abraham v. Lancaster Comm. Hosp.*, 266 Cal.Rptr. 360 378 (Cal. Ct. App. 1990) (abuse of process); *Crowley v. Katleman*, 881 P.2d 11083, 1087 (Cal. 1994) (malicious prosecution). Because we affirm the bankruptcy court's summary judgment in favor of Creditor on its substantive claim, Debtors cannot prevail on their counterclaims.

Accordingly we **AFFIRM** the judgment of the BAP.

FILED January 7, 1998

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP No. EC-97-1083-RyMeR
EC-97-1267

Bk. No. 92-95198
92-95197
92-94792

Adv. No. 96-9185

In re: ROBERT BOGETTI & SONS,

Debtor.

ROBERT BOGETTI & SONS; ROBERT BOGETTI & SONS, II; ROBERT PETER BOGETTI; DEOLINDA MARIE BOGETTI,

Appellants,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

ORDER

Before: RYAN, MEYERS, RUSSELL, Bankruptcy Judges.

The panel has considered the Appellant's Motion For Rehearing. The motion is hereby ORDERED DENIED.

Simultaneously with the filing of this order, the panel files an Amended Memorandum to replace the Memorandum decision filed on December 2, 1997. The Memorandum has been amended by the addition of footnote number 13, commencing at the bottom of page 16, and footnote 14, commencing at the bottom of page 17. The footnotes in the original Memorandum have been renumbered accordingly.

The judgment filed on December 2, 1997 remains unchanged.

FILED January 7, 1998
NANCY B. DICKERSON, CLERK
U.S. BKCY.APP.PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

BAP No. EC-97-1083-RyMeR
EC-97-1267

Bk. No. 92-95198
92-95197
92-94792

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In re: ROBERT BOGETTI & SONS,

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ROBERT BOGETTI & SONS; ROBERT BOGETTI & SONS, II; ROBERT PETER BOGETTI; DEOLINDA MARIE BOGETTI,

Appellants,

v.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

AMENDED MEMORANDUM[1]

Before: RYAN, MEYERS, RUSSELL, Bankruptcy Judges.

Plaintiff Bank of America NT&SA ("Appellee") filed a complaint (the "Complaint") for declaratory judgment against Robert Bogetti & Sons, Robert Bogetti & Sons II, Robert Peter Bogetti, and Deolinda Marie Bogetti ("Debtors-Appellants") requesting that the bankruptcy court declare that the Debtors' confirmed plan (the "Plan") and order confirming plan ("Confirmation Order"), and accompanying findings of fact and conclusions of law in support of plan confirmation (the "Confirmation Findings") created both a secured and an unsecured debt. Debtors answered and filed a cross-complaint (the "Cross-Complaint") for malicious prosecution and abuse of process alleging that Appellee's attempt to attach Appellant's real property and foreclose in a state court action (the "State Action") violated the "one form of action rule." Agreeing with Appellee that the Plan created two separate debts, the bankruptcy court granted summary judgment in favor of the Appellee on the Complaint and Cross-Complaint. We AFFIRM.

I. FACTS

Debtors Robert Bogetti & Sons and Robert Bogetti & Sons II are general partnerships. In 1992 and 1993,

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel. *See* BAP Rule 13 & Ninth Circuit Rule 36-3.

Debtors filed voluntary chapter 11 bankruptcy petitions.[2] On July 26, 1995, the Plan was confirmed by the bankruptcy court over Appellee's objection. The bankruptcy court entered its Confirmation Order on the same day.

This dispute involves a controversy over the interpretation of the Plan, Confirmation Order, and Confirmation Findings. Specifically, Appellee contends that it holds two claims under the Plan: (1) a replacement lien secured by real property; and (2) an unsecured claim for the debt in excess of the value of the collateral.[3] However, Debtors argue that one undersecured debt is at issue.

Appellee's claims are designated under the Plan in Class 5, which reads as follows:

> *Class 5*: This class shall consist of the secured and unsecured claims of Bank of America

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[2] All three cases were substantively consolidated on the effective date of the Plan. Seventh Amended Joint Plan Of Reorganization, at 4.

[3] On or about August 13, 1991, Robert Bogetti & Sons executed a promissory note (the "Note") in favor of Security Pacific National Bank (the "Bank"), Appellee's predecessor in interest. Complaint For Declaratory Judgment, at 2. The Note was secured by sacks of lima beans valued at $678,000. Findings Of Fact And Conclusions Of Law In Support Of Confirmation Of Debtors' Seventh Amended Joint Plan Of Reorganization, at 3-4. Under the Plan, Appellee obtained a claim secured by a lien on two separate parcels of property, which replaced Appellee's prior lien on the sacks of lima beans. *Id. See also* Seventh Amended Joint Plan Of Reorganization, at 8, 19-20. Additionally, the Plan provided Appellee with an unsecured claim for approximately $1,476,511.99. Findings of Fact And Conclusions Of Law In Support Of Confirmation Of Debtors' Seventh Amended Joint Plan Of Reorganization, at 3-4.

> (successor bank to Security Pacific Bank) (excepting therefrom the claim described in Class 9) [secured claim of Bank of America who holds the first lien on the residence located in Aptos, California].

Seventh Amended Joint Plan Of Reorganization, at 8. The Plan also sets forth an annual payment schedule. *Id.* at 19.

Debtors defaulted under the Plan by failing to make the scheduled payments to Appellee. On January 31, 1996, after an unsuccessful attempt to have the bankruptcy court appoint a liquidating agent to liquidate Debtors' assets, Appellee filed the State Action. In the State Action, Appellee sought damages for defaults under the Plan and foreclosure on the secured debt. Appellee alleged that it had two separate and distinct claims under the plan. Additionally, Appellee filed an *ex parte* motion for a right to attach order (the "Attachment Order") and a writ of attachment, which was granted.

On February 7, 1996, Debtors filed a motion to quash the Attachment Order, quash the writ of attachment, and release the property levied (the "Quash Motion") under California Code of Civil Procedure ("CCP") § 485.240(a),[4]

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[4] CCP § 485.240 provides in pertinent part:

(a) Any defendant whose property has been attached pursuant to a writ issued under this chapter may apply for an order (1) that the right to attach order be set aside, the writ of attachment quashed and any property levied upon pursuant to the writ be released. . . . Such application shall be made by filing with the court and serving on the plaintiff a notice of motion.

. . . .

alleging that Appellee had violated the one form of action rule for recovery of any debt secured by a deed of trust. Debtors asserted that a writ of attachment could not be issued on an undersecured debt unless the attaching creditor established that the value of the security had decreased.[5] In other words, Debtors argued that because Appellee had a partially secured claim foreclosure was its only remedy and the writ of attachment was improperly issued.

Debtors appeared for the Quash Motion hearing, but neither the Appellee nor its attorney attended. The state

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(c) At the hearing on the motion, the court shall determine whether the plaintiff is entitled to the right to attach order or whether the amount to be secured by the attachment should be reduced. If the court finds that the plaintiff is not entitled to the right to attach order, it shall order the right to attach order set aside, the writ of attachment quashed and any property levied on pursuant to the writ released. . . .

CCP § 485.240

[5] CCP § 483.010(b) provides in relevant part:

An attachment may not be issued on a claim which is secured by any interest in real property. . . . However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount to be secured by the attachment shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim. . . .

CCP § 483.010(b).

court granted the Quash Motion, and on June 27, 1996, the order was entered (the "Quash Motion Order").[6]

Rather than appealing the Quash Motion Order, Appellee dismissed the State Action and, on September 18, 1996, filed the Complaint. The Complaint sought a declaratory judgment interpreting the Plan and Confirmation Order. Debtors filed the Cross-Complaint seeking compensatory and punitive damages of $100 million for malicious prosecution and abuse of process.

On October 15, 1996, Debtors filed a motion to dismiss the Complaint and remand to the state court, asserting that (1) the bankruptcy court had no subject matter jurisdiction, and (2) even if it did, its jurisdiction was merely "related to" a bankruptcy, thereby requiring the bankruptcy court to abstain from hearing the Complaint and to remand the matter to state court. On December 4, 1996, the bankruptcy court denied Debtors' motion to dismiss.

On December 20, 1996, Appellee filed a motion for summary judgment (the "First MSJ") on the Complaint to have the bankruptcy court declare that the Plan and Confirmation Order clearly provided that Appellee held

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[6] The record is unclear as to the basis for the state court's granting of the Quash Motion. Debtors attached a "Transcription of Videotape" of the hearing to their reply brief. However, as discussed *infra*, because this transcript was not designated as part of their record on appeal, and because it is uncertain whether this transcript was made available to the bankruptcy court during the summary judgment proceedings, we will not consider this transcript as part of the appellate record.

two separate claims. The bankruptcy court granted the First MSJ, determining that the Plan and accompanying Confirmation Findings created both a secured and an unsecured claim in favor of Appellee. On January 29, 1997, an order was entered, and Debtors filed a notice of appeal on February 7, 1997.

On March 3, 1997, Appellee brought a second summary judgment motion (the "Second MSJ") on the Cross-Complaint, alleging that the Cross-Complaint had no merit. The bankruptcy court agreed and granted the Second MSJ on March 26, 1997.[7] On March 27, 1997, an order on the Second MSJ was entered, and on April 2, 1997, Debtors filed their notice of appeal.

By stipulation, the parties agreed to consolidate the appeals.

II. ISSUES ON APPEAL

1. Whether, after Debtors defaulted under the Plan, the bankruptcy court had subject matter jurisdiction to interpret the terms of the Plan.

2. Whether collateral estoppel precluded the bankruptcy court from interpreting the Plan and finding that Appellee had two claims.

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[7] No transcripts of the bankruptcy proceeding are included in the Excerpts of Record, and the bankruptcy orders granting the First and Second MSJ's were prepared by the Appellee's counsel.

III. STANDARD OF REVIEW

An order granting summary judgment is reviewed *de novo. Woodworking Enters., Inc. v. Baird (In re Baird)*, 114 B.R. 198, 201 (9th Cir. BAP 1990). "The reviewing court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the non-moving party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Yarbrow v. FDIC (In re Yarbrow)*, 150 B.R. 233, 236 (9th Cir. BAP 1993).

Additionally the preclusive effect of a prior judgment is also a question of law subject to de novo review. *FDIC v. Jenson (In re Jenson)*, 980 F.2d 1254, 1256 (9th Cir. 1992) (citing *Guild Wineries & Distilleries v. Whitehall Co., Ltd.*, 853 F.2d 755, 758 (9th Cir. 1988)).

IV. DISCUSSION

A. The Bankruptcy Court Had Subject Matter Jurisdiction To Interpret The Provisions Of The Plan.

Debtors contend that the bankruptcy court did not have post-confirmation, subject-matter jurisdiction to interpret the Plan because neither the Plan nor the Confirmation Order specifically authorized the bankruptcy court to resolve post-confirmation adversary proceedings. Additionally, they assert that because all estate property revested in them at the confirmation Appellee's claims have nothing to do with property of the bankruptcy estate.

We disagree. Bankruptcy Code (the "Code")[8] § 1141(b) states: "*Except as otherwise provided in the plan or the order confirming the plan,* the confirmation of a plan vests all of the property of the estate in the debtor." Appellants claim that because the bankruptcy court did not retain jurisdiction through the Plan with respect to post confirmation adversary proceedings, it did not have subject matter jurisdiction. This argument fails both as a matter of law and as a matter of fact.

The Ninth Circuit Court of Appeals has stated that "[r]egardless of any plan provision, a bankruptcy court has statutory jurisdiction under 11 U.S.C. § 1142(b)[9] to ensure that any act necessary for the consummation of the plan is carried out and it has continuing responsibilities to satisfy itself that the plan is being properly implemented." *Hillis Motors, Inc. v. Hawaii Automobile Dealers' Ass'n*, 997 F.2d 581, 587-8 n. 11 (9th Cir. 1993) (citing *Chase Manhattan Bank N.A. v. Sultan Corp. (In re Sultan Corp.)*, 81 B.R. 599, 602 (9th Cir. BAP 1987); *Findley v. Blinken (In re Joint E. & S.D. Asbestos Litigation*, 982 F.2d 721, 750 (2nd Cir. 1992)).[10] Here, the bankruptcy court's

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[8] The Code is set forth in 11 U.S.C. §§ 101-1330 (1994).

[9] 11 U.S.C. § 1142(b) states in pertinent part that "[t]he court may direct the debtor and any other necessary party to . . . perform any . . . act, including the satisfaction of any lien, that is necessary for the consummation of the plan."

[10] *See also* 8 COLLIER ON BANKRUPTCY, ¶ 1142.04[1], at 1142-7 (15th ed. Rev. 1997). Collier notes that "neither section 1142 nor the terms of a plan confer jurisdiction upon a bankruptcy court." *Id.* The court must first determine whether it has jurisdiction under 28 U.S.C. § 1334, and, if jurisdiction exists, then must determine whether abstention is appropriate. *Id.*

interpretation of the Plan and Confirmation Findings was necessary to ensure that the Plan was being properly implemented. Appellee's pursuit of its state law remedy (attachment) for Debtors' default under the Plan was directly dependent upon whether the Plan gave Appellee one or two claims. Thus, even if the Plan did not reserve to the bankruptcy court jurisdiction to enforce and implement its provisions, the bankruptcy court nevertheless had jurisdiction as a matter of law.

However, the bankruptcy court did expressly retain jurisdiction to interpret the Plan and Confirmation Order. Paragraph XVII of the Plan provides in relevant part:

> Following confirmation of this Plan, the court shall retain and have all the authority and jurisdiction as allowed by the Bankruptcy Code and other applicable law to enforce the provisions, purposes and intent of this Plan, including without limitation matters or proceedings that relate to:
>
> A. Allowance, disallowance, reconsideration, estimation, compromise, settlement, adjustment, *classification*, treatment or liquidation of claims or interest and objections thereto.
>
> . . . .
>
> G. Resolution of Controversies and disputes, including the correctness of any mistake, defect, or omission regarding *interpretation or enforcement* of this Plan and the Confirmation order.

Seventh Amended Joint Plan Of Reorganization, at 30-31 (emphasis added). Because the bankruptcy court retained jurisdiction in the Plan related to the classification of claims and resolution of controversies and disputes

regarding Plan interpretation or enforcement, Debtors' argument is without merit. Accordingly, the bankruptcy court had subject matter jurisdiction to interpret the Plan provided it met the threshold jurisdiction requirements of 28 U.S.C. § 1334(b).

Bankruptcy jurisdiction is vested in the district court over "all civil proceedings arising under title 11. . . . " 28 U.S.C. § 1334(b); *Feitz v. Great Western Savings*, 852 F.2d 455, 456-7 (9th Cir. 1988). Cases arising under § 1334(b) are delegated to the bankruptcy courts. 28 U.S.C. § 157(a); *Foothill Capital Corp. v. Clare's Food Market, Ind. (In re Coupon Clearing Serv.)*, 113 F.3d 1091, 1097 (9th Cir. 11997). Bankruptcy judges may hear and determine all "core" proceedings under title 11. 28 U.S.C. § 157(b)(1); *Coupon Clearing Serv.*, 113 F.3d at 1097. A proceeding is "core" where the substantive right sued upon is created by the Code or it is a proceeding that could only arise in the context of a bankruptcy case. *Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.)*, 935 F.2d 1071, 1076 (9th Cir. 1991) (citing *In re Wood*, 825 90, 97 (5th Cir. 1987)).

A bankruptcy court has the power to enforce the provisions of a confirmed plan. *Harlow v. Palouse Producers, Inc. (In re Harlow Properties, Inc.)*, 56 B.R. 794, 797 (9th Cir. BAP 1985). Additionally, the Ninth Circuit Court of Appeals has held that a bankruptcy court has jurisdiction over a declaratory judgment action "if such an action requiring a bankruptcy judge to determine the effect of a prior code of the bankruptcy court arises under title 11." *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326 (9th Cir. 1986).

> Simply put, bankruptcy courts must retain jurisdiction to construe their own orders if they are to be capable of monitoring whether those orders are ultimately executed in the intended manner. Requests for bankruptcy courts to construe their own orders must be considered to arise under title 11 if the policies underlying the Code are to be effectively implemented.

Id.

Because Debtors' obligations to satisfy Appellee's claims were created by the Plan, any interpretation of those obligations necessarily arise in the context of a bankruptcy case. Accordingly, we find that the bankruptcy court had subject matter jurisdiction under the Plan.[11]

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[11] Debtors also argue that even if the bankruptcy court had jurisdiction to grant declaratory relief, it should have abstained from determining the issue. We disagree.

A bankruptcy court cannot abstain in accordance with 28 U.S.C. § 1334(c)(2) (mandatory abstention) when the proceeding before the court is "core" (arises under title 11 or arises in a case under title 11). *Honigan, Miller, Schwartz, & Cohn v. Weitzman (In re Delorean Motor Co.)*, 155 B.R. 521, 524 (9th Cir. BAP 1993). Because we have determined that the interpretation of a chapter 11 Plan is a "core" proceeding, mandatory abstention is not permitted.

However, the bankruptcy court could have abstained under 28 U.S.C. § 1334(c)(1) (permissive abstention). A court may abstain from hearing a core proceeding "in the interest of justice or in the interest of comity with State courts or respect for State law. . . . " 28 U.S.C. § 1334(c)(1). The Ninth Circuit Court of Appeals has provided courts with the following factors to consider in deciding whether to abstain:

B. Collateral Estoppel Did Not Preclude The Bankruptcy Court From Declaring That Appellee Had Two Claims Under The Plan.

Debtors argue that res judicata required the bankruptcy court to give "full faith and credit" to the state

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> (1) effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficult or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in the state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceedings to the main bankruptcy case, (7) the substance rather than the form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden [on] the bankruptcy court's docket, (10) the likelihood that the commencement of the proceedings involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Delorean Motor Co., 155 B.R. at 524 (citing *In re Eastport Assocs.*, 935 F.2d 1071, 1075-76 (9th Cir. 1991) (quoting *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990)).

"[T]he dispositive factors . . . are those involving the relationship of this proceeding to the bankruptcy case, the affect [sic] of this proceeding on the bankruptcy estate and this jurisdictional framework." *Id.* at 524-25.

Here, the Complaint is a "core" proceeding, involves the proper interpretation of the Plan and Confirmation Findings, and is an integral part of the bankruptcy case. The appropriate interpretation of the Plan affects Appellee's ability to enforce its

court judgment and precluded it from deciding the issue regarding the number of claims held by Appellee under the Plan (the "Claim Issue"). Because res judicata involves claim and not issue preclusion, Debtors, in effect, argued the preclusive effect of collateral estoppel. This certainly was the understanding of the bankruptcy court. Tentative Ruling, Cont. Hearing On Plaintiff's Motion For Summary Judgment Or, In The Alternative, Partial Summary Judgment 12/20/96, at 18-21. Appellee's Supplemental Excerpts of Record, at 2:19. We, therefore, will address the preclusive effect of collateral estoppel as it relates to the Claim Issue raised in the state court and later in the bankruptcy court.

When an underlying judgment is rendered in state court, courts must apply the state's law in determining the collateral estoppel effect of the judgment. *First Nat'l Bank v. Russell (In re Russell)*, 76 F.3d 242, 244 (9th Cir. 1996) (citing *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988)); *Wright v. Turner (In re Turner)*, 204 B.R. 988, 992 (9th Cir. BAP 1997). Under California law, the following five elements are necessary for a party to establish collateral estoppel: (1) the issue sought to be precluded from litigation must be identical to that litigated in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as,

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right under the Plan. Consequently the bankruptcy court did not err in refusing to abstain under 28 U.S.C. § 1334(c)(1).

or in privity with, the party to the former proceeding. *Lucido v. Superior Court*, 51 Cal.3d 355, 341 n.3 (Cal. 1990), *cert. denied*, 500 U.S. 920 (1991); *Younie v. Gonya (In re Younie)*, 211 B.R. 367, 373 (9th Cir. BAP 1997).

We will therefore discuss these elements as they relate to the facts here.

1. The Identical Issue Was Litigated In The State Court And The Bankruptcy Court

In seeking to limit Appellee to a foreclosure remedy, Debtors clearly raised the Claim Issue in the Quash Motion. Similarly, the Complaint sought a determination of the Claim Issue in the bankruptcy court. Therefore, the Claim Issue was litigated in the state court and the bankruptcy court.

2. The Identical Issue Was Actually Litigated

In the Quash Motion, Debtors briefed the Claim Issue. Although Appellee apparently did not respond to the Quash Motion or appear at the hearing, Appellee does not argue that it did not receive adequate notice of the Quash Motion. Under California law, when an issue is properly raised by the pleadings and submitted for determination, the issue has been actually litigated, even though judgment is granted by default. *See People v. Sims*, 32 Cal.3d 468, 481 (Cal. 1982), *superseded by statute on other grounds, as stated in People v. Preston*, 43 Cal.App.4th 450 (Cal. Ct. App. 1996); *Gayen v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995) (The court must refer to the state law on whether a default judgment bars

relitigation of an issue); *In re Younie*, 211B.R. at 375 (recognizing that California law applies doctrine of collateral estoppel to default judgments). Because the claim issue was properly raised by the pleadings in the Quash Motion and judgment was entered by default, the issue was actually litigated in the State Action.

3. It Is Unclear Whether The Same Issues Were Necessarily Decided

Because no transcript of the hearing in the Quash Motion was designated in the record and because the basis for the state court's decision is not set forth in the findings of the Quash Motion, we are unable to determine whether the Claim Issue was necessarily decided. Debtors have the burden of proving that the Claim Issue was necessarily decided by the state court. The Quash Motion alleged two separate grounds for relief: (1) a writ of attachment is not available pursuant to CCP § 483.010(b) when there is only one debt secured by real property and there has been no showing of a decrease in the value of the security; and (2) the Attachment Order was issued prior to the filing of the Complaint in violation of CCP § 485.210(a).[12]

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[12] CCP § 485.2210(a) provides in pertinent part:

Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this article for a right to attach order and a writ of attachment by filing an application for the order and writ with the court in which the action is brought. *Id.* (emphasis added).

Appellant argues that the Attachment Order was unlawfully issued because it was allegedly signed on January

Although Debtors argue that the Claim Issue was necessarily decided against Appellee in the State Action, we cannot determine this to be the case from a review of the record on appeal.[13]

We acknowledge that Debtors attached a transcript of the Quash Motion hearing to their reply brief. Debtors argue that we should take judicial notice of this transcript even though the transcript was not designated in the record on appeal and there is no evidence that the bankruptcy court had a copy of the transcript when it decided

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30, 1996, and the case was not filed until January 31, 1996. Points and Authorities In Support Of Motion To Set Aside Right To Attach Order, To Quash Writ Of Attachment, And Release Property Levied Upon, at 9.

[13] For example, Appellee's Reply to Opposition To Motion For Summary Judgment states that "[t]he only dispute is whether the Plan created a single debt or two debts." However, this statement was made in response to Debtors' malicious prosecution claim where Debtors alleged that Appellee did not have probable cause to commence the State Action. It was not intended to admit that this was the only issue before the state court.

Additionally, Debtors include in their excerpts of record Robert Mehlhaff's declaration (attached to the Motion to Clarify Chapter 11 Plan) which states that Debtors' argument before the state court was that Appellee held one undersecured claim, and thus, the right to attach order should be set aside, the writ quashed, and the property levied upon released. Again, this statement only addresses some of the evidence submitted by Debtors in the bankruptcy court on what had occurred in the state court, and did not pertain to the procedural issue regarding the issuance of the attachment before the state court. Further, this declaration acknowledged that the Quash Motion was brought on two grounds.

the summary judgment motion.[14] Federal Rule of Appellate Procedure 10 (a) provides as follows: "Composition of the Record on Appeal. The record on appeal consists of

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[14] We deny the request to take judicial notice. Fed. R. Evid. 201(b) provided:

> **Rule 201. Judicial Notice of Adjudicative Facts**
>
> . . . .
>
> **(b) Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Although Federal Rule of Evidence ("FRE") 201(f) permits an appellate court to take judicial notice of any matter which the trial court could have noticed if the opposing party is given an opportunity to be heard, *see United States v. Camp*, 723 F.2d 741, 744 n.** (9th Cir. 1984) (citations omitted), it is generally recognized that courts of appeals have discretion in deciding whether to take judicial notice under FRE 201(d). *See* 21 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5110 (1977 & 1997 Supp.). Appellate courts are reluctant to depart from the general rule that an appellate court will only consider the record before the trial court. *See United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979); *In re American Biomaterials Corp.*, 954 F.2d 919, 922 (3rd Cir. 1992) (recognizes that an appellate court may look beyond the factual record before the trial court and take judicial notice of new developments not considered by the trial court); *Kemlon Prod. and Dev. Co. v. United States*, 646 F.2d 223 (5th Cir.), *cert. denied*, 454 U.S. 863 (1981); *Zell v. Jacoby-Bender, Inc.*, 542 F.2d 34, 38 (7th Cir. 1976) (declining to take judicial notice of court documents not provided to the trial court).

Here because the transcript was not part of the record before the bankruptcy court and does not involve a new development, we decline to exercise our discretion to take judicial notice of the transcript.

the original papers and exhibits filed in the district court, the transcripts of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court." Fed. R. App. P. 10 (a). Thus, "[p]apers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (citing *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979); *Panaview Door & Window Co. v. Reynolds Metal Co.*, 255 F.2d 920, 922 (9th Cir. 1958); and *Watson v. Rhode Island Ins. Co.*, 196 F.2d 254, 255-56 (5th Cir. 1952)).

Here, we do not know if the bankruptcy judge had a copy of the transcript of the Quash Motion hearing before him when he granted the First MSJ. In his tentative ruling on the First MSJ on December 20, 1996, the bankruptcy judge stated:

> First, this court does not have sufficient evidence before it to conclude that the state court quashed the writ of attachment on the basis of the on-form-of-action rule. If a finding or other determination of an issue in the first action was entirely unnecessary to the judgment, it will not have the effect of collateral estoppel. *See* 7 Witkin, *Judgment* § 268, Determination Not Essential (1985).
>
> The defendants made the motion to quash on two grounds "(1) the debt upon which the plaintiff has sued herein is secured by real property and therefore a writ of attachment is prohibited by the provisions of Code of Civil Procedure § 483.010 (b); (2) the right to attach order was unlawfully made and entered *before* an [sic] the

> above-entitled action was even commenced." (Emphasis in original).
>
> The defendants do not mention the second ground on which they based the motion, either in their opposition to the Bank's previous motion to clarify the plan, or in opposition to this motion for summary judgment.
>
> So, from the evidence presented, this court cannot determine the basis on which the motion to quash was granted. And, while the defendants did file a copy of the minute order that granted the motion to quash (which is not dispositive as to this issue), they did not introduce into evidence a copy of the formal order that was prepared and signed by the state court judge on April 4, 1996. Nor do they explain why the state court judge declined to sign their proposed order.
>
> . . . .
>
> Indeed, the fact that there is no evidence before this court that the plan, the order confirming the plan, or all of the associated findings of fact and conclusions of law were ever considered by the state court, further leads this court to believe that the order was granted on other grounds. . . .

Tentative Ruling, Cont. Hearing On Plaintiff's Motion For Summary Judgment Or, In The Alternative, Partial Summary Judgment, at 19-20.

Accordingly, because the transcript of the Quash Motion hearing is not party of the record on appeal and because it appears that no evidence was presented before the bankruptcy court establishing the reason that the state court granted the Quash Motion, Debtors have not

met their burden to show that the state court actually decided the Claim Issue.

4. The Quash Motion Order Was Final And On The Merits

Although the parties extensively briefed the issue of whether an order vacating the Quash Motion is a final order for the purposes of collateral estoppel, we find only one California case that addresses the issue. In *Peck v. Hagen*, 215 Cal. App. 3d 602 (Ct. App. 1989), the court squarely held that an order denying a motion to discharge the writ of attachment "was a final order and not subject to collateral attack." *Id.* at 609. In *Peck*, plaintiff Peck obtained and recorded writs of attachment against certain real property of defendant Henry. Prior to the attachment, Henry had assigned assets, including the real property, to Earle Hagen, assignee for the benefit of Henry's creditors. The real property was sold by agreement of the lienholders, the bank was repaid, and the balance of the proceeds deposited subject to all remaining liens. Hagen moved to dissolve Peck's attachments, arguing that the assignment terminated the attachments.

The trial court denied the motion, holding that the assignment was not a general assignment, and Hagen did not appeal. Peck then obtained judgments against Henry and levied on the accounts holding the proceeds. Hagen moved to quash the levies, arguing, in part, that the assignment terminated Peck's interest in the proceeds. The trial court granted the motion and plaintiff appealed. The appellate court held that the earlier decision on Hagen's motion to dissolve Peck's attachments precluded

Hagen from raising the same assignment issue as a basis for quashing Peck's levies. *Id.* at 607-10. As the court stated, "the trial court's previous order denying Hagen's motion to terminate the attachments is res judicata on whether there was a general assignment for the benefit of creditors." *Id.* at 607. The order was, therefore, appealable, final, and not subject to collateral attack. *Id.* at 609.

Here, like the order denying Hagen's motion to quash in *Peck*, the Quash Motion Order was appealable under CCP § 904.1(a)(5). Following *Peck*, the Quash Motion Order was final.[15] A judgment is final for

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[15] Appellee contends that *Peck* merely stands for the proposition that the failure to appeal the Quash Motion Order precluded a subsequent motion in the same case. *See* Appellee's Brief, at 15. Appellee urges us to follow the holding in *Loeb & Loeb v. Beverly Glen Music*, 166 Cal. App. 3d 1110, 1117 (Cal. Ct. App. 1985) which stated:

> [T]he attachment sought by respondent is a provisional remedy, ancillary to this main action. . . . A court's determination under the attachment law have no effect on the determination of any issues in the action, nor may the court's determinations regarding the attachment be given in evidence or referred to at trial. (Code Civ.Proc., § 484.100.) Neither the failure of a defendant to oppose the issuance of a right to attach order, nor the failure of a plaintiff to oppose issuance of an order reducing the amount to be secured by the attachment shall constitute a waiver of any defense to the opposing party's claim in the main action itself or in any other action. . . .

Id. at 1117.

However, *Loeb & Loeb* addressed the issuance of a right to attach order. *See id.* at 1116-17. Unlike an order granting or denying a motion to quash the attach order, an attachment order

purposes of collateral estoppel only if it addresses the merits. *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 n. 3 (Cal.), *cert. denied*, 500 U.S. 920 (1991). "The intention of the court to make a determination on the merits may be

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is not appealable. *See* CCP § 904.1(a)(5). *Loeb & Loeb* is, therefore, distinguishable from this appeal.

Additionally, both parties address the effect of CCP § 484.100. This section provides:

> The court's determinations under this chapter shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter nor shall they affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant. The court's determinations under this chapter shall not be given in evidence nor referred to at the trial of any such action.

CCP § 484.100 (noticed hearing provision).

However, this section is only applicable to an application for writ of attachment and has no applicability to a request to vacate a writ of attachment. Thus, reliance on this section is misplaced.

Finally, both parties cite to *FDIC v. Jenson (In re Jenson)*, 980 F.2d 1254 (9th Cir. 1992). *Jenson* held that an order refusing to vacate a writ of attachment obtained under Nevada law was not res judicata with respect to debtor's constitutional challenge to the writ of attachment. *Id.* at 1257.

However, *Jenson* involved a Nevada statute where the district court refused to certify an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* at 1255. There is no discussion as to whether the Nevada writ statute provided a right to appeal an order denying or granting a motion to quash. Thus, since *Peck* involves an interpretation of California law and addresses the issue of the finality of orders vacating or refusing to vacate motions to quash writs of attachment, we follow *Peck* and decline to follow *Jenson*, which is not directly on point.

important, but if the judgment is clearly not on the merits, the court's intention is immaterial." *Aspeitia v. California Trust Co.*, 158 Cal. ApP. 2d 150, 153 (Cal. Ct. App. 1958). The record must show that there was an actual determination of the prior action on the merits. *Id.*

The record indicates that the state court granted the Quash Motion based on the merits of the legal arguments; therefore, this was a final judgment on the merits.

5. The Same Parties Were Involved In The State Action And The Bankruptcy Proceeding.

This element is clearly met because Debtors and Appellee were the same parties before the state court and the bankruptcy court on the Claim Issue.

In summary, because it is unclear whether the state court necessarily decided the Claim Issue in the Quash Motion, collateral estoppel did not preclude the bankruptcy court from deciding the claim.[16]

C. The Bankruptcy Court Properly Granted The Second MSJ

Because Appellee prevailed on the Claim Issue, the bankruptcy court properly granted the Second MSJ on the Cross-Complaint.

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[16] Additionally, we note that Debtors do not challenge the bankruptcy court's interpretation of the Plan's finding that there were multiple claims.

1. Malicious Prosecution Claim.

The California Supreme Court has suggested in dicta that, where a creditor "maliciously procur[es] attachment in a properly instituted action in which the creditor is not entitled to the writ," abuse of process, and not malicious prosecution, is the proper cause of action. *White Lighting Co. v. Wolfson*, 68 Cal. 2d 336, 347-50 (Cal. 1968) (holding that excessive attachments should be treated as giving rise to a cause of action for abuse of process rather than for malicious prosecution). However, because there does not appear to be any controlling California case on the issue and neither party has addressed this issue in their briefs, we will separately analyze Debtors' malicious prosecution claim.

> "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]."

Crowley v. Katleman, 8 Cal. 4th 666, 676 (Cal. 1994) (quoting *Bertero v. National Gen. Corp.*, 13 Cal.3d 43, 50 (Cal. 1974)).

The Cross-Complaint alleged that, based on a single undersecured debt which resulted in damage to Debtors of $1,600,000, Appellee acted maliciously and without probable cause in obtaining the Attachment Order. Cross Claim For Damages And Demand For Jury Trial, at 4-5,

¶¶ 12-15. Because the bankruptcy court held that Appellee had two claims under the Plan and the sole basis for the malicious prosecution cause of action was that the Attachment Order was improperly obtained based on a single undersecured claim, the allegation that Appellee filed the State Action without probable cause was without merit.

Additionally, Debtors failed to provide any evidence to support their allegation that Appellee acted with malicious intent when it filed the State Action. Their blanket assertions that Appellee acted with malice have no support in the record given the bankruptcy court's determination of the Claim Issue in favor of Appellee. Consequently, the bankruptcy court did not err when it granted the Second MSJ in favor of Appellee on the malicious prosecution cause of action in the Cross-Complaint.

2. Abuse of Process Claim.

Debtors also assert in the Cross-Complaint that they have a cause of action for abuse of process. A party seeking damages for abuse of process must prove a wrongful act was committed – "a willful act in the use of process not proper in the regular conduct of the proceeding." *Loomis v. Murphy*, 217 Cal. App. 3d 589, 595 (Cal. Ct. App. 1980). The party must also show the act was committed for an improper or ulterior purpose. *Abraham v. Lancaster Community Hosp.*, 217 Cal. App. 3d 796, 826-27 (Cal. Ct. App. 1990).

The basis for Debtors' abuse of process cause of action is that Appellee improperly obtained the Attachment Order because it held a single, undersecured claim. However, the bankruptcy court decided the Claim Issue in favor of Appellee. The proper remedy for default on Appellee's unsecured claim was the Attachment Order. Therefore, Appellee did not act improperly in seeking and obtaining the Attachment Order. Accordingly, the bankruptcy court properly granted the Second MSJ in favor of Appellee on the abuse of process claim in the Cross-Complaint.

V. CONCLUSION

The bankruptcy court correctly concluded that it had subject-matter jurisdiction to interpret the Plan. Additionally, the bankruptcy court was not precluded by collateral estoppel from deciding the Claim Issue.

Based on the bankruptcy court's finding that the Plan provided Appellee with two claims, no legal or factual basis existed for the Cross-Complaint. The bankruptcy court, therefore, properly granted summary judgment on the Cross-Complaint. Accordingly, we AFFIRM the bankruptcy court's orders granting Appellee's summary judgment motions.

FILED June 2, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ROBERT BOGETTI & SONS,	)
Debtor.	)
ROBERT BOGETTI & SONS; ROBERT BOGETTI & SONS, II; ROBERT PETER BOGETTI; DEOLINDA MARIE BOGETTI,	)
Appellants,	)
v.	)
BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,	)
Appellee.	)

Before GOODWIN and TROTT, Circuit Judges, and KING, District Judge.[1]

The petition for rehearing filed May 13, 1999, is DENIED.

[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.